

89-191

No.

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MELVIN TAYLOR, PUBLIC CITIZEN, INC.,
ARTHUR L. FOX II, ALAN B. MORRISON,
AND PAUL ALAN LEVY
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and,
RYDER TRUCK LINES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED*

May a court of appeals summarily deny, without any explanation, an application for attorney fees by a prevailing party under the Equal Access to Justice Act, where a similar ruling by a district court would be summarily reversed and remanded by a court of appeals for an explanation in order to make informed appellate review possible?

* Petitioner Melvin Taylor and respondents National Labor Relations Board ("NLRB") and Ryder Truck Lines were the parties to the proceeding below. The remaining petitioners are the attorneys who represented petitioner Taylor below, as well as the public interest organization which employs the attorneys; they would have been the beneficiaries of the fee award whose denial is the sole issue in this Court. Respondent Ryder Truck Lines, Inc., was an intervenor in the lower court, and was the respondent in the underlying proceeding before the NLRB.



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IN THE
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MELVIN TAYLOR, PUBLIC CITIZEN, INC.,
ARTHUR L. FOX II, ALAN B. MORRISON,
AND PAUL ALAN LEVY
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and,
RYDER TRUCK LINES, INC.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Melvin Taylor, Public Citizen, Inc., Arthur L. Fox II, Alan B. Morrison, and Paul Alan Levy petition the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, to review the decision in this case.

OPINIONS BELOW

The decision of the court of appeals below was unreported, and is set forth at page 1a of the appendix to this petition (App. 1a). The decision of the court of appeals that denied a petition for rehearing that was filed in order to obtain an explanation of the decision at App. 1a, is also unreported, and is set forth at App. 2a. Four other unreported orders of the court of appeals on the issue of fees are set forth at App. 3a-6a.

JURISDICTION

The court of appeals did not issue a judgment embodying its decision on the attorney fee issue separate and apart from its March 31, 1989 order denying the application for attorney fees. Petitioners' petition for rehearing was denied on May 5, 1989. On June 26, 1989, Justice Kennedy granted a motion for an extension of time to file this petition, in the event that such extension were needed, until August 3, 1989. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412, provides in pertinent part:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The Due Process Clause of the Fifth Amendment provides, in pertinent part:

No person ... shall ... be deprived of life, liberty, or property without due process of law ...

STATEMENT

This case began when respondent Ryder Truck Lines fired petitioner Melvin Taylor. The discharge was upheld by a Teamster joint grievance panel, but petitioner Taylor filed a charge with the National Labor Relations Board ("NLRB"), alleging that he had been fired for the exercise of his rights under the National Labor Relations Act. The NLRB's General Counsel filed an unfair labor practice ("ULP") complaint which was upheld by an Administrative Law Judge, but the NLRB dismissed the complaint because it chose to "defer" to the decision of the joint grievance panel. 273 NLRB 713 (1985).

Petitioner Taylor then sought review of the Board's order in the United States Court of Appeals for the Eleventh Circuit. Taylor's case was handled by petitioners Arthur L. Fox II, Paul Alan Levy, and Alan B. Morrison, who are attorneys on the staff of petitioner Public Citizen, Inc. Those attorneys were simultaneously litigating several cases challenging the Board's deferral standard, which was adopted in *Olin Corporation*, 268 NLRB 573 (1984), and under which the Board refused to consider ULP charges on behalf of workers who had lost their contractual claims in arbitration. In two cases, the Board's application of the *Olin* standard was overturned and remanded to the Board for a reasoned explanation of its decision.¹ In this case, the court of appeals held that the Board's *Olin* standard for "deferral" actually represented an abdication of its statutory duty to decide ULP cases and that it was contrary to law. *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986).

Accordingly, the court of appeals reversed the NLRB's dismissal of petitioner Taylor's case, and remanded to the Board with directions to consider the merits of the ULP charge. When

¹*Harberson v. NLRB*, 810 F.2d 1516 (10th Cir. 1987); *Darr v. NLRB*, 801 F.2d 1404 (D.C. Cir. 1986).

the NLRB did consider the merits, it concluded that Taylor had been fired unlawfully, and it ordered that he be reinstated with back pay. 287 NLRB No. 82 (1987). Ryder refused to comply with the Board's order, which was subsequently enforced by an unpublished order of the court of appeals. No. 88-7193 (December 15, 1988).

After the court of appeals' initial ruling remanding Taylor's case to the Board, petitioners applied for an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), pursuant to which a party meeting certain financial standards (which Taylor uncontestedly did) who prevails against the United States is entitled to attorney fees unless the United States bears the burden of establishing either that its position was substantially justified or that special circumstances exist. *Ashburn v. United States*, 740 F.2d 843, 850 (11th Cir. 1984). After obtaining an extension of time to respond to the application on the ground that it "presents several complex legal issues," NLRB Motion of October 2, 1986. at 2 § 3, the NLRB opposed an award of fees with a twenty-eight page brief raising a number of defenses, including that: (1) Taylor was not yet a prevailing party because, although he had secured a "procedural victory" by overcoming the deferral hurdle, he had not yet succeeded on the merits of his ULP claim; (2) the NLRB's position was substantially justified; and (3) Taylor's fee claim was excessive. Five days after the Board filed its opposition, and before petitioners could submit their reply, the court of appeals summarily denied the application without explanation. App. 3a. Petitioners sought reconsideration or at least an explanation of the reasons for denial, pointing out that if the reason for denial was that the petition was premature, petitioners would then know that they were entitled to refile. That petition was also summarily denied without explanation. App. 4a.

After the NLRB granted Taylor relief on the merits, thus clearly making him the prevailing party, petitioners again ap-

plied for a fee award, but only for the time spent on the initial petition for review in the Eleventh Circuit. They filed their application at that time because, although they recognized that Ryder might seek review of the Board's new order, there was no time limit for seeking such review, and they were concerned about the thirty-day time limit for filing EAJA applications in 28 U.S.C. § 2412(d)(1)(B), which many courts have held to be jurisdictional. *Action on Smoking & Health v. CAB*, 724 F.2d 211, 225 (D.C. Cir. 1984). The NLRB moved to dismiss the application on the ground that the order denying the previous fee application was *res judicata*. That motion was denied without explanation, App. 5a, and the NLRB then filed a thirty-one page response to the fee application. This response raised a number of defenses, including that (1) the application was still premature because Taylor had not yet prevailed on the merits, inasmuch as the company had by then petitioned to review the order granting Taylor relief; (2) the NLRB's position was substantially justified; and (3) the requested fee was excessive. The application was denied with the following handwritten explanation: "Denied as premature." App. 6a.

After the court of appeals enforced the NLRB's order, petitioners filed their fee application a third time. The NLRB's thirty-one page opposition brief included the following defenses: (1) the NLRB's position was substantially justified; (2) a prevailing charging party is never entitled to fees under EAJA; and (3) the requested fee was excessive. Once again, the court of appeals denied the application summarily and without explanation. App. 1a. Petitioners then filed a petition for rehearing, which pointed out that if a district court had denied fees without explanation, as the court of appeals had done, settled Eleventh Circuit law would have required summary reversal for a reasoned explanation, and that in these circumstances, the refusal of the court of appeals to provide an explanation violated the Due Process Clause. The petition for rehearing was denied, and, as

with each of the court's other rulings on the fee application, there was no explanation. App. 2a.

REASON FOR GRANTING THE WRIT

The Denial of Attorney Fees Without Any Explanation Is Contrary to the Decisions of Most Courts of Appeals and of This Court, and Presents an Important Question of Law Concerning Practice in Deciding Fee Applications Under the EAJA.

If a district court ruled on an application for attorney fees in the manner that the court below did, most courts of appeals, including the Eleventh Circuit, would summarily reverse and remand to the district court for an explanation of the reasons why the district court acted in the manner that it did. The cases are legion that treat the refusal to state reasons for denying fees as a plain abuse of discretion which, standing alone, warrants a remand for a statement of reasons. *E.g.*, *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978); *Maglione v. Briggs*, 748 F.2d 116, 118 (2d Cir. 1984); *Lieb v. Topstone Indus.*, 788 F.2d 151, 154 (3d Cir. 1986); *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *Murphy v. Kolovitz*, 635 F.2d 662, 663-664 (7th Cir. 1981); *Szabo Food Serv. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987); *Hummeli v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980); *Hayes v. Heckler*, 785 F.2d 1455, 1457 (9th Cir. 1986); *Rothenberg v. Security Mgmt. Co.*, 736 F.2d 1470, 1472-1473 (11th Cir. 1984). *See also Taragan v. Eli Lilly & Co.*, 838 F.2d 1337, 1339 (D.C. Cir. 1988); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 479 (5th Cir. 1980) (concurring opinion *en banc*), *aff'd*, 452 U.S. 89 (1981).

Surely, the courts of appeals must meet similar standards when they make the initial ruling on a fee request. Otherwise the parties cannot be sure whether there is any basis for seeking

rehearing *en banc* or a writ of certiorari, because they cannot be sure what rules of law the court has applied in deciding that fees should not be awarded. Nor, indeed, can the parties know in what circumstances they should apply for fees (or settle fee applications) in the future. Thus, although the failure to provide an explanation here may have been based on the belief that the court was conserving judicial resources, one function that explanations perform is to assist parties in resolving future disputes (in this case, about fees) without the need for judicial intervention. That function is thwarted when no explanation is provided, and the result is to increase the amount of litigation rather than decrease it.

For example, if the court below had given as its reason for denying fees that, as argued by the NLRB, charging parties should never be awarded fees against the NLRB, that rationale would eliminate a whole class of potential fee applications for the courts to consider. It might also, of course, significantly affect the incentives for attorneys who are considering whether or not to represent charging parties in petitions for review of NLRB decisions, and it might command the attention of Congress. But there is no reason for anyone to consider that issue unless it is clear that the court below relied on it as a reason for denying fees.

If, on the other hand, the reason for the denial was that the government's position was considered to have been substantially justified, the parties should at least be told which "position" was considered, what standard of law was applied to determine whether there was substantial justification, and how the government's position was substantially justified in this case. Again, explanations help institutional litigants, both the government and administrative practitioners such as undersigned counsel, in assessing the prospects for fee applications and thus in deciding whether or not to seek them, in the case of petitioners, and to stipulate to them, in the case of respondents, in comparable

Eleventh Circuit cases in the future.

In addition to being unhelpful to a possible reviewing court and inefficient as a matter of judicial administration, the denial of fees without any explanation is a patent denial of due process. *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); *Wolff v. McDonnell*, 425 U.S. 539, 565 (1974). We do not suggest that either the statute or the Due Process Clause necessarily requires a court to provide a statement of reasons whenever it is requested to take any action by any person who chooses to file a motion. Here, however, the statute provides that a court "shall" award fees to a prevailing party unless it "finds" that one of two grounds for denying fees is present. 28 U.S.C. § 2412(d)(1)(A). The court below did not make any such finding, not to speak of providing an explanation for its decision. Petitioners' presumptive entitlement to fees, given Taylor's status as a financially qualifying party who has undisputably prevailed, is a property interest that may not be denied, consistent with due process or with the statute, without a statement of reasons.

CONCLUSION

The petition for a writ of certiorari should be granted. Because it seems unlikely that the issues would be illuminated by full briefing and oral argument, the Court should consider a summary reversal, remanding the case to the court of appeals for an explanation of its decision.

Respectfully submitted,

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Attorneys for Petitioners

August, 1989



1a

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 5 1989
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3220

MELVIN D. TAYLOR,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

RYDER TRUCK LINES, INC.,
Intervenor.

Application for Enforcement of an Order of the
National Labor Relations Board

Before VANCE, Circuit Judge, HENDERSON, Senior Circuit
Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

The petitioner's application for an award of attorney fees is
Denied.

*Hon Seybourn H. Lynne, Senior U.S. District Judge for the
Northern District of Alabama, sitting by designation.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAY 5 1989
MIGUEL J. CORTEZ
CLERK

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FOR THE ELEVENTH CIRCUIT

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versus

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Respondent,

and

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Intervenor.

Application for Enforcement of an Order of the
National Labor Relations Board

Before VANCE, Circuit Judge, HENDERSON, Senior Circuit
Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

Petitioner's petition for rehearing, construed as a motion
for reconsideration of this court's March 31, 1989 order
denying attorney's fees, is Denied.

*Hon Seybourn H. Lynne, Senior U.S. District Judge for the
Northern District of Alabama, sitting by designation.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
DEC 8 1986
MIGUEL J. CORTEZ
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3220

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versus

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and

RYDER TRUCK LINES, INC.,
Intervenor.

Application for Enforcement of an Order of the
National Labor Relations Board

Before VANCE, Circuit Judge, HENDERSON , Senior Circuit
Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

Petitioner's motion for reconsideration of the Court's November 10, 1986, order denying an award of attorney's fees is Denied.

*Hon Seybourn H. Lynne, Senior U.S. District Judge for the
Northern District of Alabama, sitting by designation.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
NOV 10 1986
MIGUEL J. CORTEZ
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Application for Enforcement of an Order of the
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Before VANCE, Circuit Judge, HENDERSON, Senior Circuit
Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

Petitioner's application for an award of attorney fees is Denied.

*Hon Seybourn H. Lynne, Senior U.S. District Judge for the
Northern District of Alabama, sitting by designation.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
FEB 10 1988
- MIGUEL J. CORTEZ
CLERK

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FOR THE ELEVENTH CIRCUIT

NO. 85-3220

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Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

RYDER TRUCK LINES, INC.,
Intervenor.

Application for Enforcement of an Order of the
National Labor Relations Board

ORDER:

The motion of the National Labor Relations Board to dismiss the petitioner's application of an award of attorney's fees is ~~Dismissed~~ Denied.

Further, the motion of the National Labor Relations Board for an extension of time, to and including 14 days from the Court's ruling on its motion to dismiss, in which to respond to the application for an award of attorney's fees is GRANTED.

s/ Robert D. Vance
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 15 1988
MIGUEL J. CORTEZ
CLERK

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versus

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Respondent,

and

RYDER TRUCK LINES, INC.,
Intervenor.

Application for Enforcement of an Order of the
National Labor Relations Board

Before VANCE, Circuit Judge, HENDERSON, Senior Circuit
Judge, and LYNNE*, Senior District Judge.

BY THE COURT:

Petitioner's application for an award of attorney's fees is
Denied as premature.

